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Supreme Court, U.S.
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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THOROUGHBRED RACING ASSOCIATIONS OF NORTH AMERICA, INC., *et al.*,

Petitioners,

vs.

ANTHONY CAPRA, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Can the public, represented by a jury, determine fairly what is or is not a matter of public concern and thereby impose civil liability where appropriate?

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STATEMENT OF THE CASE

The California Horse Racing Board denied the horse race license of Helen Capra on July 29, 1983, the same day that the Petitioners released the information to the Press.

The Ninth Circuit Court of Appeals ruled that some factors, such as the Federal Witness Program, weigh against unlimited free speech. The court concluded that a reasonable jury could decide that some matters, covered in the news release by Petitioners, were not newsworthy. The court also stated that not all the Respondents are similarly situated and that a jury could so conclude.

REASONS FOR DENYING THE WRIT

I.

The Court of Appeals has rightly left for a jury the question of what constitutes Legitimate Public Concern.

If ever there was a case that cries out as an abuse of the First Amendment Right of Freedom of Speech, this is such a case.

Petitioners *conclude* in their argument that all items of information contained in their press release are matters of *Public Concern.* What constitutes matters of legitimate public concern should rightly be decided by a jury.

There are some factors which do not outweigh principles of First Amendment Rights. Such was the case in *Sipple v. Chronicle Publishing Co.,* 154 Cal. App.3d 1040, 201 Cal. Rptr. 665 (1984). In that case the homosexual orientation of Mr. Sipple, although blatant and well-known in the San Francisco community, was unknown by his family and thereby caused him great embarrassment when publicized.

The case before you is not such a case. Not only was a public good being served before the disclosure of Respondents' Federal Witness Protection names and residence, the continuation of which is now in jeopardy, but Respondents' lives have been put in jeopardy by the release of such information.

> The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern. *Virgil v. Time, Inc.,* 527 F.2d 1122, 1129

(9th Cir. 1975), *cert. denied,* 425 U.S. 998 (1976).

Petitioners insist on bootstrapping defamation and libel principles, applying them to this tort of Invasion of Privacy. The principle is and should be different. Respondents do not argue truth as a defense, but rather the extent to which truth may be published when it is of "no legitimate concern to the public."

We contend Petitioners could easily have achieved the same ostensible goal of preventing Anthony Cuillia from re-entering the racing world by announcing that they had stopped his wife from receiving a horse race license under a Federal Witness Protection name, without releasing that name, or the residence of the Respondents.

Petitioners instead, in a calculated, malicious and dastardly attempt to bring harm to the Respondents, released every piece of identifying information they could. Such conduct does not deserve, and should not receive, the protection of the First Amendment.

Petitioners hide behind the cloak of a public agency, the California Horse Racing Board, as an excuse for releasing the information. The information from the hearing conducted by the Horse Racing Board and the circumstances surrounding that Hearing are not before the court at this time. However, the facts would show that the Board acted on the information and recommendation of the Petitioners and that the Board does not, as a matter of course, release such information to the public.

All matters of public record are not necessarily matters of public concern. Under the Federal Witness Protection program, a judge not only formally changes a person's name and gives him a new identity, but also seals the record. It was the Respondents who made this an issue of

Invasion of Privacy by disclosing information far beyond the public need, or even desire, to know.

The Petitioners assert that Respondents made no attempt to attack the decision of the California Horse Racing Board. Respondents contend that the decision of the Board and the issuance of the Press Release were made on the same day, thus the Board's decision became a moot point under the circumstances. Respondents' only recourse was to sue the parties responsible for releasing the malicious information to the press.

II.

Petitioners should be required to persuade a jury that the matters they published were of Legitimate Public Concern (i.e., newsworthy).

Petitioners insist on "begging the issue" of newsworthiness by saying that matters of public concern are newsworthy, this is a matter of public concern, therefore it is newsworthy. It is much like using the word to be defined in the very definition of that word. In reality the Petitioners are insisting that the court should decide what is a matter of "legitimate public concern" and because this is a matter of public concern to the Petitioners, it should be of "legitimate public concern" to the court. The operative word here is "legitimate." A jury is the appropriate forum to decide what is a matter of "legitimate public concern" by using the test discussed in the Ninth Circuit Court of Appeals decision. (Petitioners Appendix, P.A.-vi.)

Petitioners argue that California law (Invasion of Privacy) only protects individual's collateral rights as to the issue of "newsworthiness." We have found no case which would support such a contention.

Even if we accepted the Petitioners' limitations on determining "newsworthiness" (matters of "legitimate

public concern"), which we do not, the fact that Petitioners revealed the Federal Witness Protection names of the Respondents in conjunction with their new identities was a collateral issue. Even under Petitioners' own test the only "newsworthy" issue was that Helen Cuillia applied for a Horse Race license under an assumed name, the information as to what that name was and the residence of the Respondents was beyond the scope of "newsworthiness," a collateral issue, which under any standard should be put to the public test (a jury) to determine if it was a matter of "legitimate public concern."

The First Amendment was not meant to shield malicious, outrageous conduct, which is intended to cause harm to our citizens. The decision of the Ninth Circuit Court of Appeals should stand. There is no issue here requiring a decision by the United States Supreme Court.

CONCLUSION

For the reasons stated above this petition for certiorari should be denied.

Dated:

Los Angeles, California
November 18, 1986

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